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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 318

MISHAWAKA RUBBER AND WOOLEN MANUFACTURING COMPANY,
Petitioner,

vs.

S. S. KRESGE COMPANY,
Respondent.

PETITION OF MISHAWAKA RUBBER AND WOOLEN MANUFACTURING COMPANY FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Mishawaka Rubber and Woolen Manufacturing Company, respectfully prays for a Writ of Certiorari to the Circuit Court of Appeals for the Sixth Circuit to review the final judgment of that court entered on the 12th day of May, 1947 (petition for rehearing denied June 4, 1947). A transcript of the record in this case, including the proceedings in said Circuit Court of Appeals, is furnished herewith in accordance with the rules of this Court.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

Litigation History.

This is a case of trade-mark infringement and unfair competition.

Respondent was held to have infringed the petitioner's trade-mark, registered under the Trade-Mark Act of 1905, and to have been guilty of unfair competition. (Short R. 123).[1]

The accounting phase of the decree was reviewed by this Court at an interlocutory stage[2] and was reversed. (Acct. R. 1.) Proceedings under the revised decree and the accounting order entered thereunder have been completed and a final judgment has now been entered. (Acct. R. 129.)

Petitioner urges that the revised decree and accounting order and the final judgment have not given proper effect to the mandate of this Court.

Factual Background.

Petitioner, which manufactures and sells shoes and rubber heels, employs a trade-mark registered under the Trade-Mark Act of 1905 consisting of a red circular plug

1. There are three printed records in this case:
   Orig. R.: The original record, filed in this Court in connection with the first petition for writ of certiorari (No. 649, October Term, 1941);
   Short R.: The abbreviated record, filed in this Court for use in the proceedings after the writ of certiorari was granted; and
   Acct. R.: The accounting record, filed herewith.

2. *Mishawaka Rubber and Woolen Mfg. Co.* v. *S. S. Kresge Co.*, No. 649; October Term, 1941; 316 U. S. 203.

embedded at the center of the heel. (Reg. No. 36,471; Short R. 133.) It has spent considerable sums of money in promoting the mark as the symbol of a dependable manufacturer and as the assurance of a desirable product. (Short R. 121.)

Respondent sold heels, not made by the petitioner, but bearing circular plugs of red or reddish color "so closely resembling that of plaintiff [petitioner] that it is difficult to distinguish the products sold by the defendant from the paintiff's products." (Short R. 122.) These were found to infringe and their sale was enjoined. Moreover, the respondent was found to be guilty of unfair competition in its methods of sale. (Short R. 122.)

The unfair competition related to the selling by respondent of heels which were similar to the infringing heels, except for the color of the plug, and which were displayed for sale indiscriminately mixed with the infringing heels. (Short R. 122.)[1]

Under the original decree, the respondent was ordered to account to the petitioner for its profits resulting from the infringement, but the decree contained a proviso which, in effect, required the petitioner to prove by a procession of witnesses that each of them thought he was buying petitioner's heels and that otherwise he would not have bought said heels. (Short R. 131.)

The decision of this Court required (a) elimination of this objectionable proviso in the accounting for profits and (b) assessment of damages if the petitioner suffered damages beyond the loss of profits. (Acct. R. 5.)

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1. For convenience a chronological summary is included herewith in the appendix, showing the history of the respondent's infringement and unfair competition.

Accounting Proceedings.

A revised interlocutory decree and an accounting order were entered under the mandate of this Court and proceedings were conducted to determine the amount due to the petitioner thereunder. (Acct. R. 29-31.) The petitioner and the respondent were in general agreement as to the amounts involved, but differed as to what should be included in the final judgment.

The respondent's profits were computed as follows:

Red marked heels	$ 6,960.28
Orange marked heels	12,460.00[1]
Other colored heels mixed with red	20,570.00

(Acct. R. 113.)

The petitioner's litigation expense, occasioned by the respondent's continued infringement and unfair competition after notice was, up to November 25, 1945, $33,856.16. (Acct. R. 101.)

The District Court limited recovery to $6,960.28, the amount realized by the respondent from its sale of heels with red circular marks, only. The so-called "orange" or reddish heels were excluded from the recovery, as were those with marks in colors other than red which had been commingled and sold with the red. Moreover, the District Court denied a recovery of damages. (Acct. R. 129.)

Appeal was taken to the Circuit Court of Appeals for the Sixth Circuit which affirmed the decision of the District Court without opinion. (Acct. R. 144.)

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1. The respondent urged that this amount should be $11,105.42. (Acct. R. 117.)

JURISDICTION.

1. The date of the judgment to be reviewed is May 12, 1947; petition for rehearing was denied June 4, 1947.

2. The judgment was entered in a civil action involving trade-mark infringement under the trade-mark statutes and unfair competition.

3. The statutes under which jurisdiction is invoked are Sec. 240(a) of the Judicial Code, 28 U. S. C. 347; 28 U. S. C. 350; and Secs. 12 and 18 of the Trade-Mark Act of 1905, as amended, 15 U. S. C. 92 and 98.

4. While this is a suit involving trade-mark infringement and unfair competition, the questions submitted for review are not limited to this specific controversy, but are general questions raised by the decision of the District Court as affirmed by the Circuit Court of Appeals for the Sixth Circuit. Jurisdiction is shown under Rule 38 (5b) of this Court as follows:

a. An important question not previously decided in this Court.

b. Conflict in important respects between the Circuit Court of Appeals for the Sixth Circuit and the Circuit Court of Appeals for the Seventh Circuit.

c. Failure to comply with the mandate of this Court in this case.

d. Such departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

5. Cases believed to sustain the jurisdiction are:

S. S. Ansaldo San Giorgio I v. *Rheinstrom Bros. Co.*, 294 U. S. 494.

Mumm v. *Decker & Sons*, 301 U. S. 168.

Magnum Import Co. v. *De Spoturno Coty*, 262 U. S. 159.

Hutchinson, Pierce & Co. v. *Loewy*, 217 U. S. 457.

QUESTIONS PRESENTED.

1. Where this Court has ruled that damages beyond loss of profits should be assessed against an infringer and where a measure of such damages has been proved in the form of litigation expenses, should the accounting exclude such damages?

2. Where the District Court held that profits on "reddish" as well as "red" heels should be recovered, and then failed to award any profits on "reddish" heels, and this holding was affirmed by the Circuit Court of Appeals, should the lower courts be ordered to include profits on "reddish" heels under the general supervisory authority of this Court?

3. Where an infringer has used the infringing articles to promote the sale of other articles similarly marked except for color, and where such methods of sale have been held to be unfair competition, should the infringer be permitted to retain the profits from the sale thereof?

REASONS FOR ALLOWING THE WRIT.

1. Because the refusal of the Sixth Circuit Court of Appeals to allow recovery of litigation expense as damages where trade-mark infringement has been continued after direct notice involves a question of general importance not previously considered by this Court, but previously decided to the contrary by the Seventh Circuit Court of Appeals.

2. Because the decision of the District Court on the accounting as affirmed by the Circuit Court of Appeals, was so inconsistent with the law of this case and with the mandate of this Court herein that the inconsistencies should be corrected.

3. Because the respondent *used* the infringing marked heels to promote the sale of other heels commingled therewith in a manner held to be unfair competition and made profits therefrom attributable to the infringement which it should not be permitted to retain.

Respectfully submitted,

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Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE OPINIONS OF THE COURTS BELOW.

Original Proceedings.

The opinion of the District Court in the original proceedings is not reported but will be found beginning at page 120 and extending through page 132 of the Short Record previously filed in this Court (No. 649; Oct. Term, 1941).

The opinion of the Circuit Court of Appeals for the Sixth Circuit is reported in 119 F. 2d 316. (Short R. 153.)

The opinion of this Court is reported in 316 U. S. 203. (Acct. R. 1.)

Accounting Proceedings.

The opinion of the District Court in the accounting proceedings is reported in 67 F. Supp. 1000. (Acct. R. 118-124, 129.)

The judgment of the Circuit Court of Appeals for the Sixth Circuit was not accompanied by an opinion and is not reported but will be found on page 144 of the Accounting Record filed herewith.

POINT I.

The Sixth Circuit Court of Appeals Denied Recovery of Damages Consisting of Litigation Expense Where Trade-Mark Infringement Was Continued After Direct Notice.

a. This involves a question of general importance not previously considered by this Court.

b. The Seventh Circuit Court of Appeals recently decided the same question to the contrary.

a. Question of General Importance.

The lower court in this case found:

> "The heels sold by the defendant [respondent] were of inferior quality as compared with the heels manufactured and sold by the plaintiff [petitioner] and attached to their product, and *this tended to destroy the good will created by the plaintiff in the manufacture of its superior product.* Likewise, when one of the defendant's heels was attached to footwear not manufactured by the plaintiff it would tend to cause purchasers to believe that the *entire article of footwear* was manufactured by the plaintiff." (Short R. 122, par. 11.) (Italics ours.)

Thus it is settled that the acts of the respondent tended to destroy the petitioner's good will to an extent beyond the particular articles as to which profits were awarded. The extent of the injury is uncertain, but the fact of legal injury is established.

> "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty that his own wrong has created." *Bigelow* v. *RKO Radio Pictures,* 327 U. S. 251, 265.

The injury to the petitioner's good will resulting from the respondent's use of the infringing marks on inferior heels is not measurable. It is beyond argument however, that the respondent's imitation of petitioner's trade-mark, which is known for superior quality (Short R. 122), on heels of inferior quality (Short R. 122), sold extensively for more than two years, detracted from the reputation of the petitioner's trade-mark.

The petitioner introduced evidence of litigation expense occasioned by the respondent's infringement as one measure of the actual damage the petitioner sustained as a result of the respondent's persistent infringement after notice. (Acct. R. 101.) The same measure had been used in a similar case in the Seventh Circuit. *Aladdin Mfg. Co.* v. *Mantle Lamp Co. of America* (CCA 7), 116 F. 2d 708.

This Court has not previously ruled on whether litigation expense will be allowed as damages in a case where the litigation is necessitated by wilful and persistent trade-mark infringement and unfair competition. The liberal view of this Court has been expressed, however, in *Story Parchment Co.* v. *Paterson Parchment Paper Co.,* 282 U. S. 555, 565-6:

> "The constant tendency of the courts is to find some

> way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery."

Litigation expense is a reliable measure of damages where a wrong has been done but where the exact extent is difficult of ascertainment. Such relief is believed to be particularly appropriate in the present case.

The question relates to an important aspect of the law of trade-marks and unfair competition, which has not been, but should be, settled in this Court.

b. Conflict Between Two Circuits.

The Circuit Court of Appeals for the *Seventh* Circuit has held, recently, that litigation expense is recoverable from a wilful and fraudulent trade-mark infringer. ***Aladdin Mfg. Co.*** **v.** ***Mantle Lamp Co.*** **(CCA 7), 116 F. 2d 708.**

In that case, the court stated (p. 717):

> "In the present case, there was direct proof that because of the fraudulent and wilful infringement and unfair competition of appellee, appellant incurred legal expenses aggregating $18,515.03."

The court then proceeded to award this sum as part of the compensatory damages.

The instant case involves a similar set of facts, but the decision is contrary. Here, the petitioner repeatedly notified the respondent of its infringement. The respondent agreed to desist (Short R. 140), but violated its agreement by continuing to procure and sell the heels with circular marks of red and reddish colors. (Short R. 123.) The petitioner exhausted every possibility of amicable settlement before seeking relief in the courts. Even then the respondent continued its infringement and unfair competition until enjoined. (Short R. 115.)

The respondent's *wilfulness* is shown by its persistent infringement after notice and by its failure to respect its agreement to adopt a color unlike red. It adopted a color variously described by the District Judges as *"reddish"* (Orig. R. 321) and as a "shade" of red. (Short R. 115.) Moreover, after notice, the respondent procured and sold heels with *red* marks of precisely the same color, size, shape, and location on the heels as those regarding which the original notice of infringement was given. (Acct. R. 34; Short R. 87.)

The respondent's *fraud* is shown by its persistent infringement after being notified to desist (Short R. 123), under which circumstances *"fraud • • • will be presumed"*. *Lawrence Mfg. Co.* v. *Tennessee Mfg. Co.*, 138 U. S. 537, 549; *McLean* v. *Fleming*, 96 U. S. 245, 252.

Thus, in the Seventh Circuit, when a tort feasor has wilfully and fraudulently continued its infringement and unfair competition after notice, necessitating resort to the courts, litigation expense has been awarded as a part of the compensatory damages.

Under the same circumstances, litigation expense has been denied in the Sixth Circuit, in the present case.

The conflict calls for review by this Court and such review is respectfully urged.

POINT II.

The Decision of the District Court on the Accounting Was So Inconsistent With the Law of This Case and With the Mandate of This Court That the Inconsistencies Should Be Corrected.

a. Mandate of This Court.

This Court, in its review of the original decree herein, ruled that "if the petitioner suffered damages beyond the loss of profits, the decree should provide for the assessment of such damages." *Mishawaka Rubber & Woolen Mfg. Co.* v. *S. S. Kresge Co.*, 316 U. S. 203, 205. (Acct. R. 5.)

Pursuant to the decision of this Court, the District Court entered judgment requiring the respondent to account for:

> "* * * such damages beyond loss of profits as may be shown by the plaintiff [petitioner] on the account". (Acct. R. 30.)

This was in harmony with Sec. 19 of the Trade-Mark Act of 1905 (15 U. S. C. 99) which provides that:

> "* * * upon a decree being rendered in any such case for wrongful use of a trade-mark the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby".

The fact that the petitioner has been put to expense because of the respondent's acts of infringement was recognized at one time by the same District Judge, who later failed to award damages.

> "* * * I am not in accord with the defendant's [respondent's] claim that there was no evidence of damage in the record so far, it clearly appearing that the plaintiff [petitioner] was put to the trouble and expense of notifying the defendant of the infringement, and checking the activity of the defendant in various communities". (Acct. R. 8.)

The record shows even more. The respondent agreed to use a color unlike red in its heel trade-marks (Short R. 140), but merely shaded off to a reddish or so-called "orange" color (Short R. 86), and thereafter *resumed* the use of outright red. (Short R. 87.) The continued infringement after direct notice necessitated the filing of the complaint in this case. Even then the respondent continued its infringement until enjoined by preliminary injunction, more than 27 months after direct notice of infringement. (Short R. 115.)

It is clear from the evidence that the respondent's infringement was so persistent and continued for so long in this case that litigation was necessary in order to obtain injunctive relief. The litigation had to be continued further to obtain full relief. In other words, the expense of the litigation is an expense directly attributable to the respondent's wilful and persistent infringement.

Proof was introduced by stipulation showing that the expense of this litigation up to November 25, 1945, was $33,856.16. (Acct. R. 101.)

Under the decision of this Court *in this case,* the petitioner is entitled to recover damages beyond the loss of profits. (Acct. R. 5.) Damages beyond loss of profits have been shown. (Acct. R. 101.) But the final judgment awards no damages. (Acct. R. 129.)

No explanation is given in either the District Court or in the Circuit Court of Appeals for the denial of the relief required under the decision of this Court, and accordingly review is believed to be imperative to bring the decisions of the lower courts into harmony with the decision of this Court in this case.

b. Incomplete Accounting for Profits.

Under the terms of the accounting order in this case, the petitioner is entitled to recover the respondent's profits on its sales of rubber heels with *"red or reddish"* circular inserts. (Acct. R. 31.)

The District Court, however, excluded from the final judgment the very heels which it had described as *"reddish"* (Orig. R. 321), and which another judge of the same court had described as a "shade" of red. (Short R. 115.)

The excluded heels have been referred to generally throughout this case as having "orange" circular inserts. However, from a technical viewpoint, the inserts are more nearly TILE RED or HENNA, according to a comparison with the color charts in the *Merriam-Webster New International Dictionary, Second Edition.*

When the original decree was entered, the petitioner sought to have the word "orange" included because of the possible ambiguity as to the term "reddish". (Orig. R. 315.) The District Judge declined to change the phraseology but said he would be inclined to consider the so-called "orange" heels to be "reddish". (Orig. R. 321; Acct. R. 15.)

Since the heels with the "orange" inserts were not *specifically* included within the term "reddish", the petitioner sought to have them included, *specifically,* on the first appeal to the Circuit Court of Appeals and in the original petition for writ of certiorari herein.

During the accounting, however, the respondent interpreted the petitioner's plea for a more specific injunction as an admission that the heels with "orange" inserts were *excluded* from the term "reddish". This, of course, is an unwarranted inference from the petitioner's statement that these heels were *not included* in the original, am-

biguous injunction, as petitioner merely sought to have the decree say, *specifically,* what the lower court had indicated that it actually meant.

Since a more specific definition was not obtained, it is now necessary to look to the intent of the District Judge who entered the order—at the time the order was entered. At that time he considered that the term "reddish" applied to the so-called "orange" heels. (Orig. R. 321.) It is respectfully submitted that in the proceedings under the accounting order, the intent of the District Judge who framed the original accounting order—*at the time he framed it*—should be controlling.

c. Respondent's Infringement Not Innocent.

The District Court, in its decision on the accounting, declared that the respondent's "infringement was neither deliberately wilful nor in bad faith". (Acct. R. 123.)

This conclusion conflicts with the settled law of this case!

It is settled that the respondent:

a. Continued its infringement after direct notice;
b. Switched to a "reddish" color after agreeing to adopt a color "unlike red";
c. Reverted to outright red; and
d. Did not stop infringing until enjoined more than two years after notice.

As against this, the respondent cites the Circuit Court of Appeals comment that there is no evidence that the mark was "adopted" for the fraudulent purpose of attracting business from the petitioner. This may be true. There is no proof of fraudulent intent at the *inception* of the respondent's infringement.

But when the respondent continued to infringe after

receiving direct notice and after agreeing to discontinue the infringement, **fraud is presumed.** *Lawrence Mfg. Co.* v. *Tennessee Mfg. Co.*, 138 U. S. 537, 549. Such is the law of trade-marks—and **it is the law of this case!** *Mishawaka Rubber & Woolen Mfg. Co.* v. *S. S. Kresge Co.* (C. C. A. 6), 119 F. 2d 316, 324. (Short R. 159.)

d. Unfair Competition.

The District Court's conclusion of law on the accounting that the heels other than the red did not unfairly compete (Acct. R. 121) conflicts with the settled law of this case, as enunciated by the same District Judge. (Short R. 122, 123.)

The original findings of fact and conclusions of law were not at issue during the accounting. They remain the law of the case. According to the original findings, the respondent's indiscriminate mixing of the red and reddish marked heels with those bearing similar marks in other colors constituted unfair competition in the methods of sale. (Short R. 122.)

The ruling by the District Court on the accounting is inconsistent with the law of this case, and the denial of relief predicated on that inconsistency is clearly erroneous.

From the foregoing, it is clear that the District Court's final judgment departs from its original decision in at least four respects:

1. It denies the relief required by the mandate of this Court *in this case.*

2. It excludes from the accounting heels which it had indicated were contemplated within the original decree.

3. It rejects the established rule that fraud is presumed where an infringer persists in its infringement after direct notice.

4. It disregards its own earlier ruling that the respondent was guilty of unfair competition in its methods of sale.

Notwithstanding the fact that the original findings were not in issue during the accounting, the District Court has now decided that the respondent's infringement was "innocent", that its continued violation of its promise to switch to a color unlike red was in "good faith", that the heels described by the District Judge as "reddish" are not "reddish", and that the unfair methods of sale were not tortious. The District Court has gone even further in denying the damages provided for under the decision of this Court.

Despite these inexplicable inconsistencies, the Circuit Court of Appeals affirmed without opinion. The case came up for hearing **April 8, 1947**, *seven* days after the respondent filed its main brief. Under the rules of the Circuit Court of Appeals, the petitioner was entitled to *twenty* days in which to reply to the respondent's brief, and at the hearing the court granted permission to file such a reply on or before **April 18, 1947**. On **April 10, 1947**, the court entered an order affirming the decision of the District Court—without opinion.

Upon calling the matter to the court's attention, the order was vacated and then re-entered in substantially the same form after the petitioner's reply brief had been filed. (Acct. R. 143, 144.)

It is respectfully submitted that the District Court committed serious error in disregarding the settled law and facts of this case, and in failing to enter judgment in conformity with the controlling opinion of this Court. It is submitted further that the Circuit Court of Appeals should have corrected the District Court's errors—particularly in view of this Court's reversal of the appellate court's

original decision—and that failure to do so without opinion and with no indication of careful consideration was such a departure from the usual and accepted course of judicial proceedings as to necessitate the exercise of this Court's supervisory authority.

POINT III.

The Respondent Used the Infringing Marked Heels to Promote the Sale of the Other Heels Commingled Therewith in a Manner Held to Constitute Unfair Competition and Made Profits Therefrom Attributable to the Infringement Which It Should Not Be Permitted to Retain.

It is the law of this case that the respondent was guilty of unfair competition in its methods of sale. (Short R. 122, 123.) The final judgment, however, fails to allow any recovery based on the unfair competition.

The respondent's initial wrong occurred when it sold rubber heels with infringing red circular marks. The petitioner made emphatic objection to the simulation of its registered trade-mark and insisted upon discontinuance of the infringement. (Short R. 138.)

The respondent agreed to use a color "unlike red" (Short R. 140) and selected a reddish-yellow or so-called "orange" color (Short R. 86) later described as a "shade" of red by the District Judge who granted the preliminary injunction herein (Short R. 115), and as "reddish" by the District Judge who presided over the subsequent proceedings. (Orig. R. 321.)

After continued objection by petitioner, the respondent *resumed* selling heels with *red* circular marks, which it procured from another manufacturer. (Short R. 87.)

These two types of *red* circular marks and the *reddish* circular marks were displayed and sold in counter compartments where they were mixed with other heels bearing identical and similar marks in colors other than red or reddish. (Short R. 122.)

The effect of the commingling was to signify to the purchasing public that all of the heels so intermixed were related. The infringing red and reddish circular marks and the corresponding marks in other colors were identified together so that the "commercial magnetism" of the red circular symbol was extended to the other marks. This was held to be unfair competition. (Short R. 122, 123.)

Manifestly, if the infringing heels were endowed with special sales appeal because of the reputation of the red circular figure trade-mark, by which they were identified, then the other heels which were indiscriminately mixed therewith were endowed with the same special sales appeal by being identified as related to and coming from the same source as the infringing heels.

In other words, the respondent's unfair competition in its methods of sale yielded additional profits (Acct. R. 116) attributable to the infringement by extending the sales appeal of the red and reddish marked heels to the other heels with which they were identified.

The petitioner urges that it is entitled to an accounting of the respondent's profits on its sales of the heels identified and commingled with the infringing heels. To hold otherwise is to sanction the use of infringing heels to promote the sales of the other heels and to grant a windfall to the respondent as a result of its unfair competition.

Conclusion.

Wherefore, petitioner earnestly prays that the petition for writ of certiorari be granted, the case be reviewed, and the decree of the Circuit Court of Appeals for the Sixth Circuit, denying the petitioner the relief to which it is entitled by law, be reversed.

Respectfully submitted,

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APPENDIX.

Chronological Summary Showing History of Respondent's Infringement and Unfair Competition.

1933 **January**—Respondent began selling heels with infringing *red* circular figure trade-mark. (Short R. 86.)

May 5—Petitioner complained of mark as infringing its registered trade-mark. (Short R. 46, 138.)

May 19—Respondent agreed to use "some other color unlike red". (Short R. 46, 140.)

June 6—Respondent began selling heels with so-called "*orange*" or *reddish* trade-mark. (Short R. 49, 86.)

1934 **February 15**—Petitioner complained of continued sale of infringing heels. (Short R. 49, 141.)

Spring—Respondent began selling heels with *beige* circular trade-mark. (Short R. 87.)

June 14—Petitioner again complained of respondent's continued sale of infringing heels. Petitioner also objected to indicriminate mixing of red marked heels with heels bearing similar marks in other colors. (Short R. 142.)

July 1—Respondent began purchasing and selling heels with infringing *red* circular mark obtained from a new source. (Short R. 87.)

September 15—Respondent began selling heels with *yellow* diamond shaped mark. (Short R. 87.)

December 1—Respondent began selling heels with *green* circular mark. (Short R. 87, 91.)

NOTE: *Respondent continued to sell the infringing heels and the heels bearing the other marks indiscriminately mixed together during this period until the preliminary injunction was granted.*

1935 **August 10**—Preliminary injunction granted restraining respondent from selling any heels with red circular marks and from procuring any heels with circular marks in red "or any shade thereof including orange." (Short R. 115.)